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SJC-13246

ANN C. McNEFF, personal representative,¹ vs. THOMAS CERRETANI.

May 12, 2022.

Summary Process, Appeal. Bond. Practice, Civil, Summary process, Appeal, Motion to dismiss.

Background. The plaintiff, Ann C. McNeff, and the defendant, Thomas Cerretani, are two of the children of the decedent, Ralph Cerretani. Pursuant to the terms of the decedent's will, both parties have an interest in property that the decedent owned in Billerica, where the defendant resided with the decedent prior to and at the time of the decedent's death. The will also conferred upon the plaintiff, the named personal representative of the decedent's estate, the power to sell the property. Pursuant to that authority, and because the defendant continues to reside at the property, the plaintiff commenced this summary process action to have the defendant removed.² Following a bench trial, a judge in the Housing Court granted the plaintiff judgment for possession in May 2021.

The defendant filed a timely notice of appeal from the judgment, and the judge subsequently held a hearing to set the amount of the requisite appeal bond. After the hearing, the judge issued an order, on July 30, 2021, setting the appeal bond

¹ Of the estate of Ralph Cerretani.

² Prior litigation between the parties established that a deed purporting to grant title to the property to the defendant was a forgery and a nullity. See McNeff v. Cerretani, 96 Mass. App. Ct. 1115 (2020) (memorandum and order pursuant to rule 1:28).

in the amount of \$267.42.³ The order also stated that "[w]ithin [six] days from the date of this order, as a condition for the entry of this action in the Appeals Court, the [d]efendant shall deposit with the Clerk of Court such bond" and that as a "further condition of the bond, the Defendant shall pay the Plaintiff \$1500.00 monthly use and occupancy beginning on August 16, 2021" and continuing, on the first day of each month while the defendant's appeal is pending.

On August 16, 2021, the defendant filed a motion to pay the appeal bond late in which he stated that he had attempted to pay the bond but that the court would not accept it because it was late.⁴ The plaintiff opposed the motion. She also filed a motion to dismiss the defendant's appeal from the summary process judgment. The judge denied the defendant's motion to file the appeal bond late on the basis of the judge's belief that the court did not have the authority to grant an extension of time to pay the statutorily required bond. The judge also allowed the plaintiff's motion to dismiss the appeal, on the basis that the defendant had failed to pay the bond and had not made the required use and occupancy payments. The defendant appeals from both the denial of his motion to file the appeal bond late and the allowance of the plaintiff's motion to dismiss. We transferred the case to this court on our own initiative.

Discussion. General Laws c. 239, § 5, which governs appeals from summary process judgments, provides that a party appealing from such a judgment must file a notice of appeal within ten days after the entry of judgment. G. L. c. 239, § 5 (a). There is no question that the defendant here timely

³ The amount of the appeal bond equaled the costs awarded to the plaintiff as part of the summary process judgment.

⁴ Defense counsel stated at the hearing on the motion to file the appeal bond late that the defendant was on his way to file the bond the day that it was due; that his motor vehicle broke down; and that when he then attempted to file the bond the next day, the bond was not accepted by the court clerk's office on the basis that it was late. There is no sworn testimony from the defendant to this effect, however, in the record (e.g., no affidavit stating why the bond was not timely filed or on what day the defendant attempted to file it). That said, it appears that, based on the timing of the relevant orders and motions, the defendant's attempt to file the bond could not have been more than a few days late.

filed a notice of appeal. The statute also provides, in § 5 (c), that, as is relevant here, before any such appeal is allowed, the defendant "shall . . . give bond in a sum as the court orders." An indigent defendant may move to waive the bond, pursuant § 5 (e), and the statute sets forth a time frame for doing so.⁵ The statute further sets forth the process for seeking review of the denial of a motion to waive the bond, in § 5 (f) and (g).

What the statute does not do is specifically set forth a time frame for filing the bond itself, where the defendant has not sought to waive it. That is the issue with which we are concerned here. This is not a case where the defendant sought to waive the appeal bond or failed to comply with any of the statutory requirements to that end. Indeed, the defendant avers that he was ready, willing, and able to pay the bond but was precluded from doing so on the basis that it was late.

There is no question that the defendant's attempt to file the bond was made after the six-day time frame set forth in the judge's order, and the defendant does not argue otherwise. When the judge subsequently denied the defendant's motion to file the bond late, he did so on the belief that he had no authority to extend the time for filing the bond. That belief appears to stem from a misapprehension of G. L. c. 239. Although the judge did set a six-day time frame for filing the bond, there is nothing in G. L. c. 239 that requires that the bond be paid within this time frame -- that is, six days from the date on which the court sets the bond amount.⁶ The requirement that the

⁵ Section 5 (e) provides that a motion to waive the appeal bond "shall, together with a notice of appeal . . . be filed within the time limits set forth in this section." The time for filing a notice of appeal is, as we have noted, ten days, and this ten-day time frame has been applied to the filing of a motion to waive the appeal bond as well. See U.S Bank Trust, N.A. v. Johnson, 96 Mass. App. Ct. 291, 295-296 (2019).

⁶ In Liberty Mobilehome Sales, Inc. v. Bernard, 6 Mass. App. Ct. 914, 914 (1978), the Appeals Court did state that a "judge of the Housing Court ha[s] no power to extend the time for filing either the appeals or the bonds required by" G. L. c. 239, § 5. The issue in that case, however, appears to have been only the timeliness of the defendants' notice of appeal, and the court's statement about the time for paying a bond appears to have been gratuitous. Nowhere in the opinion did the court explain the basis for its statement that a Housing Court

bond be paid within six days, or within any particular timeframe, is, in short, not statutory. Rather, the statute is silent on the matter.

Indeed, there are other timing issues related to the bond requirement as to which the statute is equally silent. See Youghal, LLC v. Entwistle, 484 Mass. 1019, 1021 (2020) (G. L. c. 239, § 5, "does not address the mechanism for setting an appeal bond"); U.S. Bank Trust, N.A. v. Johnson, 96 Mass. App. Ct. 291, 295 (2019) (G. L. c. 239, § 5, "does not prescribe a process or time frame for setting an appeal bond"). In the U.S. Bank Trust case, the court also noted that G. L. c. 239, § 5, is "silent" as to the consequence of a defendant's failure to move to waive the bond within ten days from the entry of judgment. Id. Although we are not here concerned with waiver issues, the statute's silence as to those bond issues is informative.

It is true that a trial court judge generally does not have the authority to enlarge the time for filing an appeal where the appeal period is set by statute. See, e.g., Friedman v. Board of Registration in Med., 414 Mass. 663, 665 (1993) (court cannot override statutory appeal period "when the manner and time for effective filing of an appeal are delineated in the statute"). That, however, is not the circumstance presented here. Although the filing of the bond is required for purposes of taking an appeal, the statute nowhere sets forth a time frame for that filing. As such, the judge was not without authority to allow the defendant's motion to file the bond late. The judge set the six-day time frame for filing the motion and had the authority to extend it.

Because the judge was mistaken about his lack of authority to allow the defendant's motion to file the appeal bond late, his decision to allow the plaintiff's motion to dismiss on the basis that the defendant had not filed the bond was, in the circumstances, erroneous. The judge's decision to allow the plaintiff's motion to dismiss was also based on the defendant's failure to make use and occupancy payments, as ordered by the judge, and we turn briefly to that point.

Where a judge has ordered a defendant to make use and occupancy payments pending an appeal from a summary process judgment, the failure to make such payments may warrant dismissal of the appeal. See, e.g., Cambridge St. Realty, LLC

judge has no power to extend the time for filing of the bond, and we do not follow it.

v. Stewart, 481 Mass. 121, 137 n.19 (2018) (G. L. c. 239 "permits dismissal of an appeal by the trial court only when a tenant fails to post the initial appeals bond or use and occupancy payment"). If the judge had dismissed the defendant's appeal solely on this basis, we might readily have affirmed that judgment. But where the decision to allow the motion to dismiss was intertwined with the judge's mistaken conclusion that he had no authority to extend the time for filing the bond, we cannot say what might have happened if the judge had considered the defendant's motion to file the bond late on the merits.

The case therefore must be remanded to the Housing Court for consideration of the merits of the defendant's motion to file the appeal bond late. As circumstances may warrant, the plaintiff is free to again seek to have the defendant's appeal from the summary process judgment dismissed, whether on the basis of a failure to pay the bond or a failure to pay use and occupancy.

Conclusion. The judgments denying the defendant's motion to file the appeal bond late and allowing the plaintiff's motion to dismiss the defendant's appeal from the summary process judgment are reversed, and the case is remanded to the Housing Court for further proceedings consistent with this opinion.

So ordered.

The case was submitted on briefs.

John F. Gallant & Nancy A. Morency for the defendant.

David R. Lucas & Ann F. DeBaggis for the plaintiff.

H. Esme Caramello, Ilana B. Gelfman, Richard M.W. Bauer, & Akiko Endo for City Life/Vida Urbana, amicus curiae.